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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-379

VOLKSWAGEN OF AMERICA, INC. and VOLKSWAGEN PRODUCTS CORP.,

Petitioners,

vs.

CALNETICS CORPORATION, MEIER-LINE, INC., R.W.C. SALES CORPORATION, ROLF W. CHRISTIANSEN, WILLIAM R. SACHKO, PHILLIP BALLINGALL, D.C. HARDING, D.N. EMANUEL, R.S. BELLER and F.E. EDWARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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The brief in opposition is replete with erroneous assertions of fact. We do not believe, however, that the attention of this Court should be diverted to the resolution of factual issues. Whether the pleadings of the opposing parties are supported by evidence; whether petitioners' or respondents' version of the facts is correct — these are for the trier of fact in the district court to determine, not this Court. Contrary to respondents' assertions, the petition for certiorari presents questions of law, not fact. It seeks review by this Court of the rulings of law of the Court of Appeals because those rulings, affirming summary judgment against petitioners, deny them the right to have the factual issues determined in the district court.

I.

Respondents err in stating that, "*on the basis of the facts* developed in the case,"[1] there was "nothing more than a claim of commercial bribery . . . ."[2] First, the facts were not "developed" below since VW's counterclaim was summarily dismissed before trial for legal insufficiency. The factual record is thus governed by the allegations in the counterclaim, which for purposes of summary judgment are assumed to be true. *See, e.g., California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972). Second, the express terms of the counterclaim allege a restraint of trade including, *but not limited to*, commercial bribery. Both respondents and the Court of Appeals have inaccurately characterized this case as involving nothing more than a solitary incident of commercial bribery.[3]

As the text of the counterclaim shows,[4] the allegation of commercial bribery was specifically "tied to claims of other acts tending to restrain trade."[5] Indeed, it was only one of four separate acts which petitioners claimed were carried out in furtherance of an illegal conspiracy to restrain and monopolize interstate trade and commerce in the distribution and sale of air conditioning systems for Volkswagen and Porsche automobiles in the Southwest.[6]

[1] Brief in Opp. 9 (emphasis in original).

[2] *Id.* at 9-10.

[3] *See id.* at 9-12; Pet. App. 92a n.20.

[4] Pet. App. 115a-20a.

[5] Pet. App. 92a n.20.

[6] The relevant text reads:

> 11. Beginning some time in or about 1968, the exact date being presently unknown to cross-claimants, and continuing through and including the year 1970, cross-defendants and other co-conspirators presently unknown to

(continued)

Other acts alleged are: (1) a contract under which VPI would purchase "exclusively" from Calnetics;[7] (2) the

[6] (continued)

> cross-claimants, contracted, combined and conspired between and among themselves to restrain interstate trade and commerce and attempted to monopolize trade and commerce in the distribution and sale of air conditioning systems for Volkwagen and Porsche automobiles in Southern California, Arizona, Southern Nevada and Hawaii, in violation of Sections 1 and 2 of the Sherman Act.
>
> 12. In furtherance of said contracts, combination and conspiracy, cross-defendants and each of them, together with co-conspirators presently unknown to cross-claimants, entered into a plan and program to interfere with, impair and eliminate cross-claimants as competitors in the aforesaid interstate trade and commerce in Southern California, Arizona, Southern Nevada and Hawaii and to attempt to monopolize said interstate trade and commerce in said areas. More particularly cross-defendants and each of them together with co-conspirators presently unknown to cross-claimants performed numerous acts to prevent and foreclose cross-claimants from selling air conditioning systems to VPI and dealers in Volkswagen and Porsche automobiles in Southern California, Arizona, Southern Nevada and Hawaii . . . . [Pet. App. 117a-18a.]

The allegation of commercial bribery reads:

> (b) CALNETICS bribed CHRISTENSEN, BALLINGAL and other employees of VPI, whose names are presently unknown to cross-claimants, to use their position at VPI to induce VPI and VPI dealers to purchase all or substantially all of their air conditioning system requirements from CALNETICS to the exclusion of all other manufacturers and distributors of such air conditioning systems, including cross-claimants. [Pet. App. 118a-19a.]

[7] (a) R.W.C. SALES, CHRISTENSEN and BALLINGAL entered into a contract with CALNETICS, whereby CHRISTENSEN and BALLINGAL agreed, during the period of their employment by VPI, to cause VPI to purchase all or substantialiy all of its air conditioning system requirements

(continued)

"dissemination of false and misleading information" regarding the air conditioners sold by VW;[8] and (3) the wrongful "inducement" of VPI to promote and sell exclusively Calnetics' products without regard to their merits.[9] Notwithstanding the court's narrow characterization of its holdings, the dismissal of VW's counterclaim necessarily rested on the view that the presence of commercial bribery automatically excludes the application of the Sherman Act to restraints of trade that are accomplished by, or accompany, such bribery. Certiorari is appropriate to determine whether this decision fashions an immunity under the Sherman Act for a form of anticompetitive conduct, all too common in recent years, that does violence to the statute and settled precedents of this Court.

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[7] (continued)

from CALNETICS to the exclusion of all other manufacturers and distributors of such air conditioning systems, including cross-claimants. [Pet. App. 118a.]

[8] (c) Cross-defendants caused the dissemination of false and misleading information regarding the relative merits of the air conditioning systems manufactured by CALNETICS and those manufactured by VWP [VPC] to induce VPI and VPI dealers not to purchase VWP's air conditioning systems from VWP or VWA. [Pet. App. 119a.]

[9] (d) Cross-defendants induced VPI and VPI dealers to promote the sale of CALNETICS' air conditioning systems without regard to their merits and induced VPI to purchase and become an exclusive distributor of such air conditioning systems to the exclusion of all other air conditioning systems, including those manufactured by VWP, when in fact CALNETICS' products were defective and could not fairly compete on their merits with cross-claimant's air conditioning systems. [Pet. App. 119a.]

II.

The alternative basis for the summary dismissal of VW's counterclaims, also affirmed by the Court of Appeals, rests entirely on a single deposition statement of VW's president that VW had made no profits on its subsidiary's air conditioning units.[10] To conclude that VW could prove no damages resulting from the diversion of VPI's air conditioner purchases to Calnetics, it was necessary for the lower courts to infer from the absence of profit that the diverted sales, had they gone to VW, would have failed to produce profits or, at a minimum, would have failed to reduce VW's actual losses. By drawing inferences favorable to the party seeking summary judgment rather than to the party resisting summary judgment — itself contrary to settled law[11] — the Court of Appeals has adopted a blanket rule precluding antitrust plaintiffs from recovering damages if their operations have not yet achieved profitability. This principle conflicts with the Fifth Circuit's rule in *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16 (5th Cir.), *cert. dismissed*, 419 U.S. 987 (1974), that the absence of profits will not defeat antitrust recovery.

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[10] Respondents inaccurately state that "VW's President testified on several occasions that the distribution of air conditioners was not a profitable business . . . ." Brief in Opp. 13. The only statement in the record relating to the profitability of VW's air conditioner sales is Mr. Perkins' deposition testimony that VW's expenses ate up the profit from the resale of its subsidiary's air conditioners (R.1448). As pointed out in the petition for certiorari, the expenses referred to were in the nature of fixed costs. Pet. 20 n. 10, 21. It should be emphasized that Mr. Perkins is not an accountant and that he was offering no projections of financial performance under hypothetical circumstances (R. 1447-49). The testimony referred solely to actual profitability during the startup period immediately following VW's acquisition of Delanair. This was also the period during which Calnetics was bribing VPI's key employee and VPI's purchases had been shifted from VW to Calnetics.

[11] Adickes v. Kress & Co., 398 U.S. 144, 158-59 (1970), *quoting* United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

Respondents correctly point out that in *Terrell* the court had before it elaborate net profit projections introduced at trial. Brief in Opp. 14-15. But that merely underscores the error in this case, because the court's holding below deprived VW of the opportunity of a trial where a comparable analysis might have been offered. The conflict between the Fifth and Ninth Circuits is over the correct rule of law to be applied when an antitrust plaintiff cannot show that existing operations are profitable. The fact that the Ninth Circuit formulated its rule on a summary record rather than after full trial compounds the error, not, as respondents urge, eliminates it.

III.

Contrary to the broadbrush reading of *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), advanced in the brief in opposition (pp. 15-18), the Court in that case carefully distinguished between the right of an antitrust plaintiff to bring a private antitrust action when he is also at fault and his right to recover for damages attributable to his own misconduct. This basic distinction between standing and computation of damages was expressly recognized in Mr. Justice Black's opinion for the Court:

> The possible beneficial byproducts of a restriction from a plaintiff's point of view *can of course be taken into consideration in computing damages*, but once it is shown that the plaintiff did not aggressively support and further the monopolistic scheme as a necessary part and parcel of it, his understandable attempts to make the best of a bad situation should not be a ground for *completely denying him the right to recover* which the antitrust acts give him. [*Id.* at 140; emphasis supplied.]

The crucial fact in this case is that Calnetics offered no evidence in the Section 7 trial to support its damage claim other than so-called expert testimony of projections based on "optimism." *See* Pet. 24 n.13. Unlike other antitrust plaintiffs, Calnetics could not establish its damages under one of several acceptable methods of proof because it had no market history in the business of selling air conditioning systems for Volkswagen and Porsche automobiles other than the sales generated by the bribery scheme. Pet. App. 18a. On remand, the question of the nexus between the bribery scheme and Calnetics' sales to VPI will be subject to determination by the trier of fact. The legal question before this Court and appropriate for resolution prior to retrial is whether the Court of Appeals correctly held that if those sales are found to have resulted from the commercial bribe, such sales can provide the sole basis for measuring Calnetics' damages, assuming that its subsequent loss of VPI's business can be shown to be the result of any alleged lessening of competition flowing from VW's acquisition of Delanair.

Certiorari is appropriate, therefore, to determine whether the Ninth Circuit improperly extended *Perma Life* beyond its intended scope, and to assure that on remand Calnetics will not receive a recovery inflated by reason of its own misconduct.

IV.

The petition for certiorari (pp. 27-30) raises the question whether the Ninth Circuit, like the Third Circuit in the pending *Brunswick* case (No. 75-904),[12] applied an improper standard of proof of causation in a private Section 7

[12] NBO Indus. Treadway Cos. v. Brunswick Corp., 523 F.2d 262 (3d Cir. 1975), *cert. granted sub nom.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 424 U.S. 908 (1976).

damage action. Under that standard, it is unnecessary to show, as the Second Circuit requires, that the plaintiff's alleged damages were "the economic result of the *anti-competitive* effects" of the acquisition. *GAF Corp. v. Circle Floor. Co.*, 463 F.2d 752, 759 (2d Cir. 1972), *cert. dismissed*, 413 U.S. 901 (1973) (emphasis in original).

The only effect of VW's acquisition of Delanair was that the latter's status changed from that of a captive independent supplier to a subsidiary. Neither in theory nor in fact did such change in the character of Delanair restrict or otherwise affect the competitive opportunities of Calnetics and other sellers of air conditioners. The brief in opposition (pp. 18-19) lists a number of disputed items of evidence showing, at most, only that Calnetics' alleged injury occurred after VW's acquisition of Delanair, and not that it was causally related to any lessening of competition caused by the acquisition. If such evidence were again to be presented on remand, petitioners will refute it. The point here, however, is that even if accepted by the trier of fact in the district court, it would not meet the proper standard of causality proof required of a Section 7 private plaintiff by Section 4 of the Clayton Act, 15 U.S.C. §15. Certiorari is appropriate, therefore, to assure that the improper standard announced by the court below will be reversed and not govern the trial on remand.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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